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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 962

U. S. DAIRIES SALES CORPORATION, PURITY PACK CORPORATION, MILK CONTAINER EQUIPMENT CORPORATION, MAURICE J. BRASILE, AND EUGENE BLUM,

Petitioners,

vs.

THE MOJONNIER DAWSON COMPANY,

Respondent.

PETITIONERS' REPLY BRIEF IN PETITION NO. 962.

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court:

I. Respondent's Discussion of Its Charge of "Inaccuracies" in the Petition Clearly Shows the Falsehood of This Charge.

Respondent, at the top of page 4 charges that your Petitioners seriously distorted *record facts* in their Petition for a Writ of Certiorari. Few of the nine purported inaccuracies (Resp's. Br., 4-7) have any significance for purposes of this Petition. However, we answer as follows:

1. In the first numbered paragraph of Point I (Resp's. Br., 4) Respondent states that the Petitioners erroneously

presumed that the Court of Appeals totally disregarded findings of fact.

And Respondent correctly says that the Court of Appeals discussed Findings 15, 16, 17 and 19. But Question One of the Petition (Pet., 2) is directed to the disregard by the Court of Appeals of findings relating to Count III (Pet., 6) which findings are Findings 10, 11, 12 and 13 (Pet., 5).

2. Respondent in part number 2 (Resp's. Br. 4-5) reiterates its argument that the facts alleged in Counts I and III are closely related. Whether or not there is a close relationship between the facts alleged in Counts I and III is immaterial for purposes of this Petition. The important thing is that a trial was had on Count III. And Respondent states that consideration of Count III at the trial was proper. ("The District Court properly heard the evidence under Counts I and III because these claims were related." Resp's. Br., 5.)

Your Petitioners submit that this admission by Respondent that consideration of both Counts I and III was proper effectively estops Respondent from arguing that in the absence of other error, the Court of Appeals could properly reverse the District Court for deciding Count III without first deciding the issue of infringement. In other words, the Respondent should not be allowed to argue as an independent ground for upholding the reversal and remand of Count III, that Count III, although it was properly *tried*, should not be *decided*. This problem is the gist of what your Petitioners have attacked in Question 2(a) which asks whether under the circumstances of this case, the Court of Appeals could properly reverse the District Court on the basis that Count III could not properly be decided before a decision on Count I. (Pet., 2-3. And see the carryover paragraph in Pet., 6-7, and the carryover paragraph in Pet., 7-8.)

Respondent in numbered paragraph 4 (Resp's. Br., 5-6) seems to be arguing that judgment could be awarded on Count III even though the patent was held invalid or not infringed. This is clearly an admission that Petitioners' Question 2(a) (Pet., 2-3) is well taken.

3. Respondent states (Resp's. Br., 5) that the Petitioners wrongly assume that the District Court decided Count III as an independent cause of action. A reading of the memorandum opinion clearly shows that the District Court treated Count III as a separate claim for unfair competition (Record, 1168-1170). In addition, Respondent is being extremely inconsistent in taking the position that the District Court did not treat Count III as a separate claim for unfair competition; Respondent had in the Court of Appeals taken a position directly contrary to his present position and squarely consistent with Petitioners' position. Thus in Respondent's Statement of Points, number 29 (Record, 1191), Respondent had argued that the District Court had improperly treated Count III as a "separate cause of unfair competition."

4. Respondent argues (Resp's. Br., 5-6) that your Petitioners incorrectly state that the District Court predicated its pre-trial order as to the sequence of trial on the assumption that plaintiff's claim under Count III was dependent on the patent being held valid and infringed. It is clear that the District Court originally held the notion that Count III was dependent on the patent being held valid and infringed and that it held this view at the time of the pre-trial order. (See Fg. 19, Record, 1176.) But the Court did alter its view as the trial proceeded and the proofs were made, as we have attempted to show in part 2 *supra*, and as Respondent itself admits in its brief (Resp's. Br., 5).

5. Numbered paragraph 5 (Resp's. Br., 6) declares that Petitioners incorrectly stated that the only reference

to findings 10-13 appears *at page 24 of Plaintiff's Brief* to the Court of Appeals. To refute this, Respondent states that this is incorrect and that it *had* contended that the District Court had made erroneous findings—*at page 24 of Plaintiff's Brief!* Petitioners wish to state here that they reaffirm their original contention in the Petition that Respondent's discussion of Count III did not attempt to show that the findings of the District Court were clearly erroneous. (Pet., 5-6.) Respondent's numerous citations to its briefs in its Brief in Opposition (Resp's. Br., 6) upon inspection merely reconfirm Petitioners' original contention that Respondent merely alludes to portions of its own evidence without attempting to demonstrate how the District Court's findings were clearly erroneous.

6. Section 6 is dealt with by Petitioners under Point II since Respondent there repeats its position.

7. Although the award of costs is discretionary, this Court may review an abuse of discretion.

8. Respondent asserts that the Petition is inaccurate in stating that fact findings 10, 11, 12 and 13 relate solely to issues of fact raised by Count III. A reading of Findings 10, 11, 12 and 13 (Record, 1173-1174) will clearly show that Respondent's assertion is not well taken.

9. This statement by Respondent that the length of the trial was caused by Defendant's numerous defenses is contrary to the intimation of Finding 19 (Record, 1176), that the 16-day trial resulted from Respondent's insistence on varying from the terms of the pre-trial order relating to the procedure to be followed on the trial. Also see Record, 117 where a colloquy in the District Court graphically shows that Respondent's conduct of his case was far from expeditious.

II. Refutation of Respondent's Point II

(Resp's. Br., 8).

A. Respondent in his Point II (Resp's. Br., 8) asserts that the Court of Appeals reversed the District Court "for the reason that the District Court used an unreliable test (Pet., 30), 'a thought too ambiguous and general on which to conclude that there was no unfair competition by the Brasile defendants.' "

Our position is that the Court of Appeals arbitrarily ignored the District Court's findings of fact and chose to require Count III to be relitigated.

We can quickly demonstrate our position that the Court of Appeals disregarded findings of fact on Count III by reference to four record references;

(1) Count III alleged certain acts of unfair competition, specifically that defendants stole trade secrets of plaintiff in violation of confidential relations, and that defendants palmed off their product as plaintiff's (Record, 24-27).

(2) The Memorandum Opinion of the District Court was filed November 15, 1955 (Record, 1168-1170). In the only portion of that opinion devoted to Count III the District Court stated:

> "Perhaps it will clear the atmosphere a bit if the court states at once that it does not believe there was any unfair competition on either side. The plaintiff owned a patent which it thought was valid and infringed by the defendants. The defendants thought the patent was invalid and that if it was valid that they did not infringe it. Both sides did what human beings usually do under those circumstances, nothing more. So the case is reduced to the simple patent infringement suit, —all that it ever should have been." (Record, 1168-1169.)

(3) Findings of Fact and Conclusions of Law, filed February 21, 1956 (Record, 1171-1177). The pertinent findings appear at Record 1173-1174 (Figs. 10-13).

(4) Opinion of the Court of Appeals (Pertinent portions appear after the number 2, Pet. 29-30).

It is clear from these writings that the District Court made specific findings of fact dealing with Count III and that the District Court found the facts to be contrary to the Respondent's allegations.

It is equally clear that the District Court did not attempt to set forth any test in the paragraph quoted from its memorandum opinion. The Respondent did not urge on appeal the point that a wrong test was used. On the appeal, the Respondent's sole reference to the italicized words in the Court of Appeals' opinion appears in Point III of plaintiff's statement of points (Record, 1191). It is apparent from a reference to Respondent's original brief in the Court of Appeals (Brief, pp. 62-63)* that Respondent was disputing the District Court's holding that there was no confidential relationship and that Respondent was not arguing that the District Court used the wrong test or that the District Court used any test. It would seem that if the Court of Appeals were reversing on a ground not argued that it would have made its position clear.

In the light of this knowledge, it seems clear that the Court of Appeals disregarded the District Court's findings of fact on Count III. Whether it did so by erroneously imputing the use of a wrong test to the District Court, or by plainly ignoring the findings would seem unimportant. The Court of Appeals' opinion on Count III appears at Petition 29-30. It would seem that the only reasonable conclusion from the statements in that opinion is that the Court of Appeals looked only to the District Court's memo-

* Certified copies of which have been filed by Petitioner.

randum opinion in deciding whether the District Court erred. On doing this, the Court of Appeals concluded that the District Court had "not set forth a basis of fact for this conclusion." And in referring to the italicized words in the quoted portion, the Court of Appeals said that these words were "too ambiguous and general on which to conclude that there was no unfair competition * * *"; thus the Court of Appeals thought that the District Court based its conclusion on the italicized words instead of formal findings of fact.

Your Petitioners so interpreted the Court of Appeals' opinion on their Petition for Rehearing (Resp's. Br., 1a-10a), and the Court of Appeals did not see fit to correct this interpretation. The Court of Appeals summarily denied that Petition (Resp's. Br., 15a).

The interpretation of your Petitioners is borne out by the additional fact that the Court of Appeals remanded for a new trial (Pet., 30) when, if it had concluded that a wrong test had been applied by the District Court, a proper disposition would have been a remand for decision in accordance with the correct test. It should also be noted that the Court of Appeals did not propose any correct test.

B. Even if the Court of Appeals' opinion can somehow be interpreted to say that the ground of remand was that a wrong test was used, the Court of Appeals would manifestly be in error. As we have stated in part A above, a reading of the memorandum opinion (Record, 1168-1170) will clearly show that the District Court was not attempting to establish any test. Secondly, Respondent did not urge the point on appeal. The first indication Petitioners had that the use of a wrong test was a ground for reversal was the publication of the opinion of the Court of Appeals (See Part A, *supra*).

Your Petitioners submit that a new trial will bring up no new facts and that the District Court on remand will

apply exactly the same standards used by the District Court in the original trial. No purpose will be served by a new trial other than to cause your Petitioners to bear the risk of the expense of relitigation. And your Petitioners will have been forced to pay the costs on the appeal to the Court of Appeals which are attributable to Count III. And finally, this litigation may not end after that trial but may involve another appeal to the Court of Appeals.

III. Petitioners Did Not Discuss the Court of Appeals' Error in Reversing the District Court's Holding of Invalidity Because That Is a Question Going to the Merits.

Respondent in Point III (Resp's. Br., 8) states that Petitioner did not argue that the Court of Appeals erred in reversing the District Court's holding of invalidity. Petitioners did not introduce into the Petition discussion relating to Question 3 (Pet., 3) because any discussion of error would go to the merits of the question and not to the reason for granting certiorari. The question was presented for the purpose of preserving the issue should certiorari be granted.

IV. Refutation of Respondent's Point IV

(Resp's. Br., 9).

Respondent's Point IV appears merely to be a summary of its prior arguments.

V. Refutation of Respondent's Point V

(Resp's. Br., 9).

Respondent's Point V is manifestly false in its implications. The Petition does not require extensive review of evidence. And for Questions 1 and 2, not one bit of evi-

dence need be considered. Respondent thus attempts once again to cloud the issues in an attempt to cause this Court to deny certiorari.

VI. Refutation of Respondent's Point VI

(Resp's. Br., 10).

Where the remand for new trial can be wholly obviated by a correction of the Court of Appeals' opinion, issue of a writ of certiorari is proper. See *American Construction Co.* v. *Jacksonville T. & K. R. Co.*, 148 U. S. 372, cited by Respondent (Resp's. Br., 10). All of the questions involved in the case at bar may be finally resolved by this Court.

VII. Refutation of Respondent's Point VII

(Resp's. Br., 10).

Respondent's Point VII is irrational and incomprehensible to your Petitioners. It seems to be self-contradictory and is perhaps meant to persuade this Court that the issues are clouded.

VIII. Refutation of Respondent's Points VIII and IX

(Resp's. Br., 10-11).

Points VIII and IX by their nature require no answer. However, it perhaps should be stated that the financial difficulties Petitioners are in were caused by this suit.

For the reasons stated in the original Petition, we submit that the petition should be granted, and that this Court's writ of certiorari should issue to the Court of Appeals for the Seventh Circuit to review its decision in the instant case.

Respectfully submitted,

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